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No. 02-5664

In The

Supreme Court of the United States

CHARLES THOMAS SELL, D.D.S.,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

SUPPLEMENTAL BRIEF OF PETITIONER

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INTRODUCTION

Petitioner Dr. Charles Thomas Sell submits this Supplemental Brief in response to the Court's Order of February 28, 2003 directing the parties to file supplemental briefs addressing "the jurisdiction of this Court and of the Court of Appeals in this case, see *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)." In accord with the government, Dr. Sell submits that the Court of Appeals had jurisdiction under 28 U.S.C. § 1291 pursuant to the collateral order doctrine and that this Court has jurisdiction under 28 U.S.C. § 1254(1).

ARGUMENT

THE COURT OF APPEALS HAD JURISDICTION BECAUSE THE ORDER OF THE DISTRICT COURT AUTHORIZING THE GOVERNMENT TO FORCIBLY MEDICATE DR. SELL SOLELY FOR THE PURPOSE OF PENDERING HIM COMPETENT TO STAND TRIAL CONSTITUTES A "FINAL DECISION" UNDER SECTION 1291 AS THAT TERM IS CONSTRUED PURSUANT TO THE COLLATERAL ORDER DOCTRINE.

Jurisdiction in this Court is proper pursuant to Section 1254(1),[1] which provides that cases in the courts of appeals may be reviewed by the Supreme Court by writ of certiorari. This Court properly granted a writ of certiorari on November 4, 2002. 123 S. Ct. 512. This case was properly in the United States Court of Appeals for the Eighth Circuit pursuant to Section 1291, which provides that the courts of appeals "*shall* have jurisdiction of appeals from all *final decisions* of the district courts of the United States. . . . " (emphasis added). The Court of Appeals had jurisdiction because the District Court order authorizing

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[1] Unless otherwise indicated, all section citations are to Title 28 of the United States Code.

the government to forcibly medicate Dr. Sell with antipsychotic drugs solely for the purpose of rendering him competent to stand trial constitutes a final decision.

Generally, a final decision requires a district court order concluding the litigation, which, in criminal cases, usually takes the form of a conviction and imposition of sentence. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989). However, in the case of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), this Court recognized that Section 1291 does not limit appellate jurisdiction to "those final judgments which terminate an action." *Id.* at 545. Instead, the term "final decision" was to be given a "practical rather than a technical construction." *Id.* at 546; *see also Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) ("The collateral order doctrine is best understood not as an exception to the 'final decision' rule . . . but as a 'practical construction' of it. . . . ") (citations omitted).[2] In accord with this practical construction to be given to Section 1291, the *Cohen* court recognized a small class of district court decisions that, though short of final judgment, are final decisions that are immediately appealable because they "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546. To fall within the limited class of final collateral orders, an order must (i) "conclusively determine the disputed question," (ii) "resolve an important issue completely separate from the merits of the action," and (iii) "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v.*

[2] As Justice Jackson, the author of *Cohen*, later recognized: "[I]t is a final *decision* that Congress has made reviewable. . . . While a final judgment always is a final decision, there are instances in which a final decision is not a final judgment." *Stack v. Boyle*, 342 U.S. 1, 12 (1951) (separate opinion).

Livesay, 437 U.S. 463, 468 (1978) (footnote omitted). The order at issue here satisfies the collateral order doctrine requirements.

A. The District Court's Order Falls Squarely Within This Recognized Class of Final Decisions and Represents a Narrow Application of, Not an Extension of, the Collateral Order Doctrine.

While the collateral order doctrine is strictly interpreted in criminal cases, *Midland Asphalt*, 489 U.S. at 799, this Court has recognized three examples of pretrial orders in criminal cases that constitute final decisions under the collateral order doctrine: the denial of a motion to reduce bail, *Stack*, 342 U.S. at 4-5, denial of a motion to dismiss an indictment under the Double Jeopardy Clause, *Abney v. United States*, 431 U.S. 651 (1977), and denial of a motion to dismiss under the Speech or Debate Clause, *Helstoski v. Meanor*, 442 U.S. 500 (1979).

Although this Court has not squarely addressed the appealability of the order at issue here, every court of appeals to address the issue, including by implication the court of appeals below (J.A. 356-82), has uniformly held that an order approving the involuntary medication of a pretrial detainee constitutes an appealable collateral order under *Cohen*. *See United States v. Gomes*, 289 F.3d 71, 79 (2d Cir. 2002), *petition for cert. pending*, No. 02-7118 (filed October 22, 2002); *United States v. Morgan*, 193 F.3d 252, 258-59 (4th Cir. 1999); *United States v. Brandon*, 158 F.3d 947, 950-51 (6th Cir. 1998); *see also United States v. Weston*, 255 F.3d 873 (D.C. Cir. 2001) (exercising, without expressly considering the issue, appellate jurisdiction over a district court order authorizing the involuntary medication of a criminal defendant to render him competent to stand trial); *cf. United States v. Weissberger*, 951 F.2d 392, 396 (D.C. Cir. 1991) (holding court had jurisdiction under *Cohen* to review order permitting involuntary confinement for competency examination under 18 U.S.C. § 4241(a)). While parties cannot consent to jurisdiction,

the government agrees with the holdings of these courts of appeals. (Gov't Brief at 10 n.5).

1. The order conclusively determined the disputed question, namely whether the government could forcibly medicate Dr. Sell with antipsychotic drugs solely for the purpose of attempting to render him competent to stand trial for non-violent offenses.

To fall within the collateral order doctrine, the order must "conclusively determine the disputed question." *Coopers & Lybrand*, 437 U.S. at 468. In holding that a pretrial order denying a criminal defendant's motion to dismiss premised upon a double jeopardy claim satisfied this requirement, this Court explained:

> [T]here can be no doubt that such orders constitute a complete, formal, and, in the trial court, final rejection of a criminal defendant's double jeopardy claim. There are simply no further steps that can be taken in the District Court to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee.

Abney, 431 U.S. at 659; *see also Richardson v. United States*, 468 U.S. 317, 321-22 (1984).

The order at issue in this case is no different. Once the District Court affirmed the Magistrate Judge's order authorizing the forcible administration of antipsychotic medication to Dr. Sell in an attempt to render him competent for trial, the decision was final. Dr. Sell could take no further steps in the District Court to avoid the forced administration of antipsychotic drugs. The District Court recognized as much in further ordering that "the magistrate judge's order permitting the involuntary administration of antipsychotic medication to defendant Charles Sell is stayed for fourteen (14) days to permit defendant to take an appeal from this ruling." (J.A. 355). But for stays of the order, the Bureau of Prisons would have already forcibly medicated Dr. Sell against his will.

Thus, the question of whether Dr. Sell can be medicated without violating his Fifth and First Amendment rights has been conclusively determined by the District Court. As the government itself acknowledges, a hearing was required upon Dr. Sell's claim that he could not be forcibly medicated. (Gov't Supp. Br. at 2). Further, the government agrees that whether and to what extent Dr. Sell could receive a fair trial after being forcibly medicated with antipsychotic drugs is directly relevant to whether the government's interest in attempting to render him competent to stand trial for non-violent charges can justify the infringement of his fundamental liberty interests secured by the First and Fifth Amendments.[3] (Gov't Supp. Br. at 7-8) (citing, *inter alia*, *Gomes*, 289 F.3d at 82 (requiring a showing that "the defendant can be fairly tried while under the medication" before forcible medication could be allowed); *Weston*, 255 F.3d at 883-86 & n.8 (recognizing that fair trial concerns should be considered in assessing the accused's "Fifth Amendment substantive due process argument," noting that such analysis requires a "predictive judgment now"); Reply Br. of Petitioner at 19 (explaining that "a predeprivation review of Dr. Sell's Fifth and Sixth Amendment trial rights is vital to the consideration of whether the government's interest in overriding Dr. Sell's First and Fifth Amendment rights is compelling"). If the validity of the very trial that provides the

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[3] To the extent that this Court finds that consideration of Dr. Sell's Fifth and Sixth Amendment trial rights is not required in connection with a First and Fifth Amendment substantive analysis, an examination of whether Dr. Sell is entitled to a premedication hearing before deprivation of his Fifth and Sixth Amendment trial rights, and the standards to be applied at such a hearing, are likewise reviewable under the collateral order doctrine for the same reasons articulated herein. *See Riggins v. Nevada*, 504 U.S. 127, 143-44 (1992) (Kennedy, J., concurring) (recognizing that trial prejudice must be considered before medication). Without a pre-medication review of the effects of antipsychotic drugs upon Dr. Sell's trial rights and defenses, there will be no baseline against which to compare the post-medication results. Post-judgment appeal would be ineffective in preserving these interests.

government's sole purpose for forcibly medicating Dr. Sell will be fraught with procedural infirmities, then the government's interest in pursuing this suspect process is greatly diminished. The failure to properly consider the unfairness of any potential trial that might be made possible only through the forcible administration of antipsychotic medication is further evidence of the violation of Dr. Sell's First and Fifth Amendment substantive rights and the improper standard applied by the District Court and the Court of Appeals.

2. Determining whether the government can forcibly medicate a citizen, presumed to be innocent, with antipsychotic drugs solely for the purpose of rendering him competent to stand trial for non-violent offenses is an important issue completely separate from the merits of the underlying indictment.

The next requirement under the collateral order doctrine is that the order must "resolve an important issue completely separate from the merits of the action." *Coopers & Lybrand*, 437 U.S. at 468. The merits of the underlying non-violent indictment focus on whether Dr. Sell was guilty or not guilty of mail fraud, healthcare fraud, and money-laundering. The order at issue before this Court has absolutely nothing whatsoever to do with Dr. Sell's guilt or innocence. An entirely separate evidentiary hearing was held for the exclusive purpose of determining whether the government could forcibly medicate Dr. Sell with antipsychotic drugs. (J.A. 159-60). As such, the District Court's order satisfies the completely separate requirement.

The District Court's order is far more removed from the merits of the underlying litigation than many other pretrial orders that this Court has found appealable under the collateral order doctrine. *See Richardson*, 468 U.S. at 321-22; *Behrens v. Pelletier*, 516 U.S. 299, 309-11 (1996) (holding that, despite prior appeal, denial of summary judgment on grounds of qualified immunity was

appealable pursuant to the collateral order doctrine). For example, in *Richardson*, the government argued that "resolution of the double jeopardy claim inevitably involves evaluation of the sufficiency of the evidence against petitioner at the first trial, and therefore the claim is not completely collateral to the merits of the charge against petitioner." 468 U.S. at 321. The government went on to explain that the district court's "canvassing of the record would be indistinguishable from an assessment of the sufficiency of the evidence that would be reviewed after a judgment of conviction, and, of course, would go to the heart of the Government's case on the merits." *Id.* While acknowledging that "[a]ll of this may be conceded," this Court nevertheless reasoned "we think that the collateral-order doctrine applied in *Abney* should not be read so narrowly as to bar from interlocutory review the type of double jeopardy claim asserted here." *Id.* at 321-22. Because the petitioner in *Richardson* sought review of the sufficiency of the evidence at his first trial, not to reverse a judgment entered on that evidence, but as a necessary component of the separate claim of double jeopardy, this Court held that the district court's order denying petitioner's double jeopardy claim was appealable under the collateral order doctrine. *Id.*

Unlike the order at issue in *Richardson*, the order here had no overlap with the merits of the case. The evidence introduced at the magistrate judge's evidentiary hearing had nothing to do with Dr. Sell's guilt or innocence. Instead, the evidence introduced at the hearing included testimony pertaining to, among other things, the side effects caused by antipsychotic medication, whether these drugs would achieve their goal of rendering Dr. Sell competent to stand trial, and Dr. Sell's alleged dangerousness in an institutional setting. (J.A. 158-319). None of this evidence required a review of the merits of the underlying charges.

Similarly, this case addresses an important issue: whether the government has the authority to medicate a citizen with antipsychotic drugs against his will to attempt to prosecute him for non-violent charges. This Court has

recognized that "[w]here statutory and constitutional rights are concerned, 'irretrievable loss' can hardly be trivial." *Digital Equip.*, 511 U.S. at 879. Dr. Sell submits that the involuntary administration of antipsychotic drugs to a citizen implicates the most fundamental of liberty interests. The right to be free from unwanted physical and mental intrusions has long been recognized as an integral part of an individual's constitutional freedom, and such rights having been articulated under the First Amendment as freedom of thought, right to refuse unwanted medical treatment or right to privacy, under the Fifth Amendment Due Process Clause as a liberty interest or right to privacy, and as an aspect of the "right to privacy contained in the notions of personal freedom which underwrote the Bill of Rights." *United States v. Charters*, 829 F.2d 479, 491 (4th Cir. 1987); *see also Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (recognizing First Amendment privacy interest); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973) (citing various sources of right to privacy); *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992) (recognizing fundamental right for woman to have abortion); *Griswold v. Connecticut*, 381 U.S. 479, 482-86 (1965) (recognizing right to use contraceptives is fundamental); *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 278 (1990).

The fundamental liberty interests implicated by the District Court's order cannot be said to be any less important than other issues that this Court has found satisfied the collateral order requirements, such as avoiding the burdens of pretrial discovery in violation of a defendant's qualified immunity claim, *Behrens*, 516 U.S. at 308, a criminal defendant's interest in avoiding trial pursuant to a double jeopardy or Speech or Debate Clause defense, *Abney*, 431 U.S. at 659-62, *Helstoski*, 442 U.S. at 506-08, or a criminal defendant's interest in reducing bail, *Stack*, 342 U.S. at 6-7. For example, an accused's interest in avoiding "the personal strain, public embarrassment, and expense of a criminal trial" was important enough to justify a collateral order doctrine appeal. *Abney*, 431 U.S. at 661. Mere personal strain, public embarrassment, and expense are less important than the physical and mental

intrusion implicated by the involuntary administration of antipsychotic drugs.

3. The order at issue here would be effectively unreviewable on appeal from a final judgment in that the legal and practical value of Dr. Sell's fundamental right not to be forcibly medicated with antipsychotic drugs solely for the purpose of rendering him competent to stand trial would be destroyed if it were not vindicated before trial.

The third and final collateral order requirement is that the order "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468. This third prong is satisfied "where the order at issue involves 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'" *Midland Asphalt*, 489 U.S. at 799 (quoting *United States v. MacDonald*, 435 U.S. 850, 860 (1978)). In other words, an order is effectively unreviewable "when the practical effect of the order will be *irreparable* by any subsequent appeal." *Di Bella v. United States*, 369 U.S. 121, 126 (1962) (emphasis added); *see also Abney*, 431 U.S. at 658 (explaining that the third element requires that the right "would be 'lost, probably *irreparably*,' if review had to await final judgment").

The right at issue here is Dr. Sell's fundamental constitutional right not to be medicated against his will with antipsychotic drugs solely for the purpose of attempting to render him competent to stand trial for non-violent offenses. As an initial matter, and as the government also recognizes, if Dr. Sell were acquitted in the underlying criminal action, he would not be able to appeal.[4]

[4] This issue is important to Dr. Sell because he has refused the administration of antipsychotic drugs, even though he has already been imprisoned longer than he would have been if convicted of the

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Regardless, even if he were convicted and obtained appellate review of the issue, such review would not be "effective" because "the legal and practical value" of his right not to be forcibly medicated with antipsychotic drugs with potentially permanent physical and mental side effects would have already been irretrievably lost. *See Abney*, 431 U.S. at 662 ("[E]ven if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit."). Even more so than the right at issue in *Abney*, no amount of *post hoc* appellate review can vindicate Dr. Sell's fundamental right not to be forcibly medicated after the forced medication takes place. *See Gomes*, 289 F.3d at 79 ("If the defendant should prevail after he has been forcibly medicated, his right to refuse to be medicated would have been lost and his victory would be a hollow one.").

This Court has recognized that a detainee's right to reduce bail so as to remain free pending a trial is a right that cannot be vindicated on appeal from a final judgment. *Stack*, 342 U.S. at 12 (concurring opinion). Similarly, this Court has found that the right to "avoid exposure to double jeopardy and thereby enjoy the full protection of the [Double Jeopardy] Clause" satisfies this requirement. *Abney*, 431 U.S. at 662. Even the denial of a motion to dismiss on grounds of qualified or absolute immunity is subject to immediate appeal. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 143-44 (1993) (holding that Eleventh Amendment immunity claim is subject to immediate appeal and recognizing that, in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court "found

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non-violent charges. Further, Justices of this Court have recognized that while direct appeal is an appropriate remedy for determining whether a conviction was proper, direct appeal does not provide a remedy for other constitutional violations. *Riggins*, 504 U.S. at 156 (Thomas, J., dissenting).

that, absent immediate appeal, the central benefits of qualified immunity – avoiding the costs and general consequences of subjecting public officials to the risks of discovery and trial – would be forfeited, much as the benefit of the bond requirement would have been forfeited in *Cohen*"). At a minimum, a citizen's right to refuse unwanted antipsychotic medication – sought to be administered solely for the purpose of rendering him competent to stand trial on non-violent charges – presents an even more compelling example.

Nor should this case be rejected through conjecture that Dr. Sell might have initiated a separate proceeding to vindicate his constitutional rights. As an initial matter, it does not appear that Dr. Sell could have obtained effective relief through any separate proceeding. Dr. Sell could not have stated a cognizable claim under 42 U.S.C. § 1983 because the "actors" seeking to medicate Dr. Sell were not state actors, but rather the United States Bureau of Prisons. *See* 42 U.S.C. § 1983 (by its very terms, § 1983 precludes liability against federal government actors); *see also Martin v. Sias*, 88 F.3d 774, 775 (9th Cir. 1996). Nor could a *Bivens* action provide adequate relief to Dr. Sell. From the outset, an opinion in this case is necessary to set forth the law as it pertains to the involuntary administration of antipsychotic drugs to pretrial detainees. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Prior to the determination, the federal actors who seek to forcibly medicate Dr. Sell would likely assert and obtain qualified immunity, as the constitutional requirements governing forced medication of pretrial detainees will not be clearly established law. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). Further, even if Dr. Sell could obtain a final judgment in the separate *Bivens* action, it is not at all clear that he could have obtained a stay in the criminal proceeding prohibiting medication until the completion of the *Bivens* action. In addition, Dr. Sell would be additionally prejudiced by being relegated to a *Bivens* action to vindicate his constitutional rights because he would not be constitutionally

entitled to appointed counsel. *See* 28 U.S.C. § 1915(e)(1) (permitting court to appoint counsel at its discretion).

Most importantly, an accused should not be forced to wade through a procedural quagmire in order to protect fundamental liberty interests secured by the Constitution. No such procedural second-guessing took place in *Abney* or *Richardson* in securing an accused's rights under the Double Jeopardy Clause. As the government recognized, judicial review by motion in the criminal case is the appropriate procedure because the District Court has comprehensive statutory responsibilities to assess treatment bearing upon an accused's competence to stand trial. (Gov't Supp. Br. at 11-12 (citing 18 U.S.C. § 4241)). The District Court has made such an assessment and ordered that Dr. Sell be subjected to 18 U.S.C. § 4241 from which now arises the order at issue. (J.A. 320-38). Moreover, forcing a criminal defendant to initiate a separate civil proceeding to overturn an order issued by a district court in the course of a criminal proceeding would not serve the interests sought to be preserved by the "final decision" rule. Encouraging such fragmented proceedings would do more violence to the undergirding objective of judicial economy than allowing the collateral order appeal process followed here.

Similarly, given the uniform holdings of the courts of appeals that such an order is subject to review pursuant to the collateral order doctrine, Dr. Sell could not, in good faith, challenge the order through proceedings by mandamus. *See Helstoski*, 442 U.S. at 505 ("The general principle which governs proceedings by mandamus is, that whatever can be done without the employment of that extraordinary writ, *may not be done with it*. It lies only when there is practically *no other remedy*.") (quoting *Ex parte Rowland*, 104 U.S. 604, 617 (1882)). Indeed, in *Helstoski*, this Court held that, because a criminal defendant could challenge a pretrial order denying his motion to dismiss pursuant to the Speech or Debate Clause of the United States Constitution pursuant to the collateral order doctrine, mandamus was an inappropriate means of challenging the order and declined to address the merits.

Id. at 507-08. The Court reached this conclusion despite the fact that the Supreme Court had never before held that such an order fell within the contours of the collateral order doctrine. *Id.* at 509 n.* ("The Court makes the surprising assertion that Helstoski should have anticipated today's holding on the basis of a footnote in a 1975 Third Circuit opinion dealing with a different issue.") (Brennan, J., dissenting). Thus, given that every court of appeals to address the issue had already indicated the order was appealable, Dr. Sell could not reasonably have premised such a challenge upon a proceeding by mandamus. Dr. Sell's case should not be denied review for having relied upon the uniform decisions of the courts of appeals.

Both the practical reality of the manner within which this issue arose as well as sound notions of judicial efficiency demonstrate that judicial review in the criminal case is the appropriate procedure. Further, the legal and practical value of Dr. Sell's fundamental liberty interest in not undergoing forced administration of antipsychotic drugs is destroyed once the drugs are administered. These rights cannot be returned through any form of post-medication, post-judgment review. As such, the District Court's order constitutes a final decision appealable pursuant to the collateral order doctrine.

B. The Collateral Order Doctrine Is Not an Extra-Statutory Right to Appellate Review But, Rather, a Practical Statutory Interpretation of Section 1291; Moreover, Its Application to the Order at Issue Here Would Not Result in a Rash of Frivolous Appeals Undermining the Objectives of the Final Decision Rule.

The collateral order doctrine represents a practical statutory interpretation of what is meant by "final decision" in Section 1291. *See, e.g., Cohen*, 337 U.S. at 546; *Digital Equip. Corp.*, 511 U.S. at 867. This must be the case for there is no right to appeal absent congressional authorization. *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152 (2000) (quoting *Abney*, 431

U.S. at 656). In fact, despite approximately 54 years of collateral order doctrine jurisprudence, Congress has not deemed this doctrine to represent such a threat to the dockets of the federal courts as to require an amendment of Section 1291 to change the phrase "final decision" to "final judgment." *See Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) (noting significance of Congress' failure to amend statute); *see also* 28 U.S.C. § 1291 (amended by Pub.L. 85-508 (effective Jan. 3, 1959) and Pub.L. 97-164 (effective Oct. 1, 1992)). Once the collateral order doctrine requirements were fully satisfied, the Court of Appeals was compelled to accept jurisdiction of this case. 28 U.S.C. § 1291 ("*shall* have jurisdiction") (emphasis added).

While it is true that, in the criminal context, the Court has only found three examples of orders satisfying the collateral order doctrine requirements, the Court has never declined to review an order that satisfied the doctrine's requirements solely on policy concerns, such as a "floodgates" argument. For example, in *Behrens*, the Court of Appeals expressed concern that a second appeal on the issue of qualified immunity "would tend to have the illegitimate purpose of delaying the proceedings." 516 U.S. at 310. While recognizing that "[u]ndeniably, the availability of a second appeal affords an opportunity for abuse," the Court went on to note that they have no reason to believe that such abuse has often occurred. *Id.*

In the present case, the government itself recognizes that "there is no reason to think that collateral order appeals in future cases will place an unwarranted burden on federal appellate courts or will unduly disrupt criminal prosecutions." (Gov't Supp. Br. at 19). The government asserts that "[t]he universe of patients who are treated involuntarily with antipsychotic medication is relatively small." (*Id.*).[5] Regardless, if allowing such an appeal

[5] Moreover, even if that were not true and the government were making it a common practice to involuntarily medicate detainees, presumed to be innocent, then the need to set forth a clear standard to

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pursuant to the collateral order doctrine would result in a flood of new appeals, the courts of appeals already would be drowning. Since at least 1998 and, arguably, since 1991, an individual seeking to challenge an order authorizing involuntary administration of antipsychotic drugs has had authority that such an order falls within the contours of the collateral order doctrine. *See Brandon*, 158 F.3d at 950-51 (decided in 1998); *Weissberger*, 951 F.2d at 396-97 (decided in 1991). This is particularly true given the government's position that such orders are appealable under the collateral order doctrine. Further, the regulation pursuant to which the Bureau of Prisons seeks to forcibly medicate detainees to attempt to restore competence for trial has been in existence since 1995. 28 C.F.R. § 549.43. Nevertheless, despite this existing authority, no such flood of appeals has apparently occurred. Fortunately, it appears that circumstances as extreme as those presented by the case at hand are rare.

In any event, this Court has repeatedly recognized that "if and when abuse does occur, as we observed in the analogous context of interlocutory appeals on the issue of double jeopardy, 'it is well within the supervisory powers of the Courts of Appeals to establish summary procedures and calendars to weed out frivolous claims.'" *Behrens*, 516 U.S. at 310 (quoting *Abney*, 431 U.S. at 662 n.8). This Court also explained that "problems of delay can be obviated by rules or policies giving such appeals expedited treatment." *Abney*, 431 U.S. at 662 n.8. The government has recognized as much, explaining that reasonable steps can be taken to prevent frivolous claims and minimize any delay in any future cases involving the forced medication of an accused with antipsychotic drugs solely for the purpose of ruling him competent to stand trial. (Gov't Supp. Br. at 16-18). Thus, even to the extent that concerns as to frivolous claims and delay could justify rejection of

be applied in such cases is even more paramount to insure that fundamental constitutional freedoms are not being violated.

an order satisfying the collateral order requirements, in the context of the type of order at issue here, such concerns are purely speculative and can be addressed without depriving the accused of a meaningful review of these fundamental liberty interests.

CONCLUSION

The Court of Appeals had jurisdiction under 28 U.S.C. § 1291 pursuant to the collateral order doctrine, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

Respectfully submitted,

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